

This Opinion is Not a  
Precedent of the TTAB

Mailed: August 17, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board

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*In re Live Good Inc.*

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Serial No. 88877980

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Reine Rooney of Reine Rooney LLC  
for Live Good Inc.

Mariam Aziz Mahmoudi, Trademark Examining Attorney, Law Office 115,  
Daniel Brody, Managing Attorney.

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Before Cataldo, Wolfson and Adlin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Live Good Inc. seeks registration of GENRESTORE, in standard characters, for “dietary supplements” in International Class 5.<sup>1</sup> The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the registered mark RESTOREGEN, in standard characters, for “dietary supplements; natural dietary supplements for the treatment of substance and non-substance behavior cravings;

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<sup>1</sup> Application Serial No. 88877980, filed April 19, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on first use dates of October 22, 2018.

natural dietary supplements for the treatment of pro-dopamine regulator,” also in International Class 5,<sup>2</sup> that confusion is likely. After the refusal was made final, Applicant appealed and Applicant and the Examining Attorney filed briefs.

### **I. Untimely and Improperly Introduced Evidence Excluded**

During prosecution, Applicant sought to rely upon a dictionary definition (and hyperlink thereto), and third-party registrations, but did not properly make them of record. In her September 4, 2020 and February 13, 2021 Office Actions, the Examining Attorney informed Applicant that the materials were not properly introduced, but Applicant took no remedial action. The Examining Attorney’s objections to this evidence, which Applicant included in or attached to its Appeal Brief, are therefore sustained. Trademark Rule 2.142(d) (“The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.”). *See also In re Olin Corp.*, 124 USPQ2d 1327, 1331 n.15 (TTAB 2017) (“Because the information displayed at a link’s Internet address can be changed or deleted, merely providing a link to a website is insufficient to make information from that site of record.”). We have not considered this evidence.<sup>3</sup>

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<sup>2</sup> Registration No. 5565178, issued September 18, 2018.

<sup>3</sup> Thus, we have not considered Applicant’s argument that RESTORE is weak, 4 TTABVUE 5, as there is no support for it. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence.”) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)); *see also In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006 (TTAB 2014) (finding that there was no proof to support the statements in the record by counsel).

## II. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

### A. The Goods, Channels of Trade and Classes of Consumers

The goods are identical because the cited registration and involved application both identify “dietary supplements.” This factor therefore not only weighs heavily in favor of finding a likelihood of confusion, but it also reduces the degree of similarity between the marks necessary to find a likelihood of confusion. *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *In re Max Capital Grp., Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010).

Furthermore, because the goods are identical, we presume that the channels of trade and classes of purchasers for Applicant’s and Registrant’s identical goods also

overlap. *See In re Viterra*, 101 USPQ2d at 1908 (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Instit.*, 101 USPQ2d 1022, 1028 (TTAB 2011). These factors therefore also weigh heavily in favor of finding a likelihood of confusion.<sup>4</sup>

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<sup>4</sup> Applicant's argument that the goods are different because Registrant's are a "pro-dopamine regulator" made from a "specific formulation matched to individual genetics" that is intended for "addiction management," is not well taken. Applicant apparently bases this distinction on part of Registrant's identification of goods, and on Registrant's marketing. The problem is that Applicant is citing to parts of Registrant's identification of goods that are separated from Registrant's identified "dietary supplements" by a semicolon. The semicolon following "dietary supplements" means that Registrant's identified "dietary supplements" stand alone, unaffected by the rest of the identification. *In re Midwest Gaming & Ent. LLC*, 106 USPQ2d 1163, 1166 (TTAB 2013) ("Under standard examination practice, a semicolon is used to separate distinct categories of goods or services."). Thus, the goods are identical.

Furthermore, when the issue is registration, as opposed to use, we are constrained to focus on the goods as they are identified in the involved application and cited registrations, without regard to Applicant's or Registrants' actual use or marketing. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) ("It is well established that the Board may not read limitations into an unrestricted registration or application.") (quoting *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983)). As the Federal Circuit has repeatedly held, it is appropriate "for the Board to focus on the application and [cited] registrati[o]n rather than on real-world conditions, because 'the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application ... regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.'" *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Houston Comp. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (unrestricted and broad identifications are presumed to encompass all goods of the type described).

## **B. The Marks**

We consider the marks “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d*, 777 Fed.Appx. 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

Here, the marks are similar because they both combine GEN and RESTORE, without a space between the two terms. They are different because Applicant’s mark places GEN first, followed immediately by RESTORE, while Registrant’s mark places RESTORE first, followed immediately by GEN. We find that the similarities outweigh the differences.

The terms GEN and RESTORE look and sound identical in each mark, notwithstanding that their order is reversed.

The marks also convey the same meaning when used in connection with identical goods, in this case dietary supplements. As we stated in analogous circumstances:

There are no differences in these marks which would be sufficient to cause purchasers to assume that ZOG when used on clothing has one meaning, while the virtually identical term ZOGGS when used on the same goods has another. Instead, when these marks are used on the identical items of clothing, purchasers are likely to perceive ZOGGS TOGGS as simply a different version of registrant’s ZOG and design mark or are likely to assume that the marks identify different clothing lines from the same source.

*See In re Ginc UK Limited*, 90 USPQ2d 1472, 1479 (TTAB 2007)

While Applicant's mark presents the terms in Registrant's mark in reverse order, this difference is not sufficient to overcome the confusion which would arise out of Applicant and Registrant using identical terms for identical goods. In fact, word marks and transposed versions thereof, such as RESTOREGEN and GENRESTORE, are often found to create highly similar meanings and commercial impressions. *Cf. Bakers Franchise Corp. v. Royal Crown Cola Co.*, 404 F.2d 985, 160 USPQ 192, 193 (CCPA 1969) ("Regarding the marks DIET-RITE and RITE DIET, the board said: ... applicant's compound mark includes the same words which make up opposer's mark, that is to say 'RITE DIET' is merely 'DIET-RITE' transposed. The marks of the parties create substantially the same commercial impressions and 'RITE DIET' is but a colorable imitation of 'DIET-RITE'. Appellant found no fault with this analysis; nor do we."); *In re Wine Soc'y of Am. Inc.*, 12 USPQ2d 1139, 1142 (TTAB 1989) (affirming refusal to register THE WINE SOCIETY OF AMERICA & Design based on registration of AMERICAN WINE SOCIETY 1967 & Design, finding the difference in connotation to be "minor"); *In re Nationwide Indus., Inc.*, 6 USPQ2d 1882, 1884 (TTAB 1988) (affirming refusal to register RUST BUSTER for rust-penetrating spray lubricant based on the mark BUST RUST for penetrating oil); *In re Gen. Tire & Rubber Co.*, 213 USPQ 870, 871 (TTAB 1982) (affirming refusal to register SPRINT STEEL RADIAL for pneumatic tires based on registration for RADIAL SPRINT for vehicle tires); *Bank of Am. Nat'l Trust and Sav. Ass'n v. American Nat'l Bank*, 201 USPQ 842, 845 (TTAB 1978) ("[T]he words 'BANKAMERICA' and 'BANK OF

AMERICA’, on the one hand, and ‘AMERIBANC’, on the other, convey the same meaning and create substantially similar commercial impressions”); *Plus Prods. v. Physicians Formula Cosmetics, Inc.*, 198 USPQ 111, 114 (TTAB 1978) (“[T]he use of identical terms in inverse order as we have in the present case is likely to cause confusion in trade when used on such closely related cosmetic products.”).

As we held in *In re Nationwide Indus.*, 6 USPQ2d at 1884, “the reversal in one mark of the essential elements of another mark may serve as a basis for a finding of no likelihood of confusion only if the transposed marks create distinctly different commercial impressions.” Here, there is no evidence that the marks create “distinctively different commercial impressions,” nor any other basis for finding that they do. Applicant’s mere argument that the cited mark “refers to restoring (restore) a genetic (gen) response,” while Applicant’s mark “refers to generation (gen) and restore,” 4 TTABVUE 3, is not only completely unsupported, but Applicant does not explain how or why consumers would understand the marks to convey these purported meanings and commercial impressions. In the absence of supporting evidence, it seems just as likely that consumers would understand both marks to refer to either a “genetic” response, or to “generation.”

In any event, as Applicant concedes, the commercial impression of both marks is that the dietary supplements offered thereunder will “restore” something missing in the user’s body or diet. Thus, to at least that important extent, the marks create similar commercial impressions. *See Carlisle Chemical Works, Inc. v. Hardman & Holden*, 434 F.2d 1403, 168 USPQ 110 (CCPA 1970) (reversing dismissal of

oppositions to registration of COZIRC based on use of ZIRCO for related goods, finding that the marks “are substantially similar, the difference being in a reversal of syllables which are essentially the same”); *Fisher Scientific Company v. Ipco Hospital Supply Corporation*, 165 USPQ 471, 472 (TTAB 1970) (sustaining opposition to MIX O THERM based on THERMIX used for identical goods, stating “they are in their essentials merely reverse combinations of the same words, and such being the case, would more than likely convey substantially the same commercial impressions”).

Finally, as we pointed out in *Bank of Am.* and *Plus Prods.* (and many cases since) we must keep in mind: (1) “the fallibility of memory over a period of time;” (2) that the “average” purchaser “normally retains a general rather than a specific impression of trademarks;” and (3) that Applicant’s and Registrant’s marks are comprised of the same terms and used in connection with identical goods. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). *See also In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (“marks must be considered in light of the fallibility of memory”) (citation, internal quotation marks, and ellipsis omitted). In this case, “the average person,” who may not encounter Applicant’s and Registrant’s marks side-by-side, “may well transpose the elements of [the marks] in his mind.” *Bank of Am.*, 201 USPQ at 845.<sup>5</sup> This factor also weighs in favor of finding a likelihood of confusion.

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<sup>5</sup> Even if we agreed with Applicant’s argument that the cited mark is conceptually weak, we must presume that it is inherently distinctive. *In re Fiesta Palms*, 85 USPQ2d 1360, 1363

### C. Consumer Sophistication and Care

We accept Applicant's argument that some consumers of Applicant's and Registrant's goods will exercise heightened care in purchasing supplements they intend to ingest. This factor therefore weighs against finding a likelihood of confusion.

### III. Conclusion

While we assume that some consumers will exercise care in purchasing Applicant's and Registrant's goods, which weighs against finding a likelihood of confusion, we find this factor outweighed by the identity of the goods, their overlapping channels of trade and classes of consumers, and the similarities between the marks. *See, In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986); *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970); *see also HRL Assoc., Inc. v. Weiss Assoc., Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods).

**Decision:** The refusal to register Applicant's mark under Section 2(d) of the Trademark Act is affirmed.

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(TTAB 2007) (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997)). It is settled "that likelihood of confusion, mistake or deception is to be avoided as much between weak marks as between strong marks." *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974)).